IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1280 of 2006

With

CRIMINAL MISCELLANEOUS APPLICATION NO. 8098 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE DN PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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HITESH BABU DHNADE(MARATHI) & 1 - Appellant(s)

Versus

STATE OF GUJARAT - Opponent(s)

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Appearance :

MR MITESH R AMIN for the Appellants.

Mr. K.C.Shah, Addl. PUBLIC PROSECUTOR for the respondent.

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CORAM : HONOURABLE MR.JUSTICE DN PATEL

Date : 01/09/2006

ORAL JUDGMENT

This appeal has been preferred against the judgment and order dated 6th July, 2006 in Sessions

case no. 33 of 2005 passed by the learned Additional City Sessions Judge, Court No.13, Ahmedabad, by which the present appellant No.1 (original accused No.2) has been convicted for the offence of abetting the offence committed by the accused no.1 namely Rameshsing Shambhusing (who is not the appellant before this Court) for the offence punishable under sections 363, 366, 376, 342 read with section 114 of the Indian Penal Code; the appellant No.2 (original accused no.3) has been convicted for abetement of the offence committed by the accused no.1 as well as for attempting the commit rape for the offence punishable under sections 363, 366, 342 and 376 of the Indian Penal Code. The appellant no.1 has been sentenced to undergo rigorous imprisonment of one year and pay a fine of Rs. 1000/- in case of default, further rigorous imprisonment of 10 days and the appellant no. 2(original accused no.3) has been convicted and sentenced to undergo rigorous imprisonment of two years and pay a fine of Rs. 5000/-, in default, further rigorous imprisonment of one month.

2. I have heard the learned advocate for the

appellants who has mainly submitted that looking to the depositions on record, it appears that the prosecutrix was more than 16 years of age on the date of offence. The date of offence is 23rd December, 2003 at 11.00 hours and the date of birth of the prosecutrix is 2.1.1987 as per her deposition as well; as documentary evidence at exh. 25. It is stated by the learned advocate for the appellants that the appellants have not committed any rape on the prosecutrix. The original accused no.1 who has been convicted for the offences punishable under sections 363, 366, 376 of Indian Penal Code is not before this Court. So far as these two appellants are concerned, the appellant no.1 had followed by a separate and another scooter to the prosecutrix and accused no.1 who were going on bicycle. That is the only role played by appellant No.1. Thus, the prosecutrix and original accused no.1 were in love with each other and were going on bicycle and the appellant no.1 (original accused No.2) was following them. That is the only charge against the appellant No.1. Even in the complaint, there is nothing against the appellant No.1. In no way, the present appellant

No.1 (original accused No.2) has abated the offence committed by the original accused no.1 There are no antecedents of the present appellant no.1. As on the date of the offence, the appellant was aged 27 years. In fact, looking to the deposition of the prosecutrix, who is P.W.1 and examined at Exh.21, she has clearly stated in her deposition that she had gone to accused no.1 on motorbike and she remained with original accused no.1 for approximately three to four hours. She was more than 16 years of age, even as per the deposition given by Dr.Chandrakant Bachubhai Patel, PW 3 Exh.12. The doctor has given a certificate that she was more than 16 years of age and less than 19 years of age, on the basis of x ray report of the prosecutrix. It is also stated by the learned advocate for the appellants that nowhere in the depositions of the prosecutrix, there are allegations of abatement against the present appellant No.1 (original accused No.2). The prosecutrix has been declared hostile. Even looking to the cross-examination, there is nothing against the appellant No.1. It is also stated by the learned counsel for the appellants that after the whole

deposition and the cross-examination of the prosecutrix was over, she was called in the chamber by the learned Trial Judge. In the chamber, she has stated certain facts before the trial court. Even if such version is taken on record, there is nothing against the present appellant no.1. The only fact narrated is that she was going on a motorbike alongwith accused no.1 and the present appellant no.1 (original accused No.2) was following them on a scooter. Except this sentence, nothing is against the present appellant No.1. There is no other evidence with the prosecution which involves the present appellant no.1. Even otherwise also, the appellant no.1 was in judicial custody from December,2003 to April,2004 and thereafter, he was enlarged on bail. After the judgment delivered by the trial court, again he has surrendered to judicial custody on 6th August, 2006 and since then, till today, he is in judicial custody. Thus, approximately for five months, the appellant no.1 has remained in judicial custody. It is stated by the learned advocate for the appellants that so far as appellant No.2-original accused No.3, is concerned, there is no

evidence against the appellant No.2. If the deposition of the prosecutrix is seen closely, it is clear that she has not supported the prosecution case. The only witness which the prosecution is having, is not supporting the prosecution case and nothing is left out thereafter. Eventhough she is examined by the prosecution, no role has been stated so far as the present appellant No.2 is concerned. Looking to the case history given by the prosecutrix before the doctor who has been examined as PW-2, namely Dr.Rajendrakumar Bhigarathprasad Joshi in which the original accused No.1 is involved, not a single word about the appellant No.2 has been stated before the doctor nor in her deposition, she has stated anything against appellant No.2. It is further submitted by the learned counsel for the appellants that after the whole deposition of the prosecutrix was over, she was called in the chamber by the Learned Trial Judge. It appears that certain facts have been stated by her in the chamber and that has been recorded. Even if these statements recorded in the chamber are accepted as they are, then also, it cannot be said that the appellant No.2 has committed

any attempt of rape. There is no other evidence except the prosecution witness No.5 at Exh.21. It is also stated by the learned advocate for the appellant that the appellant No.2 has remained in judicial custody for approximately five months from December, 2006 to April,2006. Thereafter, he was enlarged on bail and thereafter, when the conviction order was passed by the trial court, this court has again sent him to judicial custody so that the criminal appeal can be taken up for its final hearing and so the appellant No.2 has also surrendered to judicial custody on 6th August, 2006 and till this date, he is in judicial custody. Thus, it is stated by the learned counsel for the appellants that there is no evidence against the appellants. Even if the case of the prosecution is taken at its highest pitch, then also, only original accused No.1 is involved in the offence. There is no evidence worth the name against the appellants of the present appeal and therefore, the judgment and order of conviction passed by the Trial Court may be quashed and set aside.

3. I have also heard the learned Additional

Public Prosecutor who has submitted that looking to the deposition given by the prosecutrix PW-5 at Exh.21, she has turned hostile, but it is stated by her in her deposition that the complaint was signed by her. In the complaint, it has been stated by her that the present appellants came alongwith the original accused No.1. The prosecutrix was kidnapped thereafter an lateron the prosecutrix remained with the original accused No.1 for a couple of hours on the motorbike. The motorbike was followed by the scooter which was driven by the appellant no.1 and ultimately, an offence of rape was committed by the accused no.1 and the present appellant no.2 had also come to commit rape but she resisted and therefore, there was an attempt on the part of appellant no.2. These facts are proved as FIR has been signed by the prosecutrix. It is also stated by the learned Additional Public Prosecutor that thought she has been declared hostile, the trial court Judge had called her in his chamber and she has stated that the original accused no.1 had committed the offence of rape and the present appellant no.2 had also attempted to commit rape. This is how the appellants

are involved in the offence and, therefore, the judgment and order passed by the Trial Court is absolutely true and correct and, hence, it may not be interfered with by this Court. As the original accused no.1 has not preferred an appeal, there is no need for detailed analysis of the depositions of doctors and other evidence on record.

4. Having heard the learned counsel for both the sides and looking to the evidence on record, in my opinion, the judgment and order dated 6th July, 2006 in Sessions case no.33 of 2005 passed by the learned Additional City Sessions Judge, Court no.13, Ahmedabad, requires to be quashed and set aside qua the present appellants for the following facts and reasons:

(i) It is the prosecution case that the offence was committed on 23rd December, 2003 at 11.00 hours. The accused no.1 (who has not preferred this appeal) had committed rape on the prosecutrix. The present appellants as well as accused no.1 came on a scooter and they kidnapped the prosecutrix and ultimately

rape was committed by accused no.1. The present appellant no.1 (original accused No.2) was following the motorbike upon which the prosecutrix as well as original accused no.1 were going on. It is also a fact that the prosecutrix and original accused no.1 remained together for approximately four to five hours. Looking to the evidence on record, the age of the prosecutrix, as per the deposition of Dr.Chandrakant B.Patel PW-3, was more than 16 years. On the basis of the x-ray, the certificate was issued by Dr. Chandrakant Patel that the prosecutrix was more than 16 years of age. According to her deposition, she has stated that her birth date is 2.1.1987. As per that birth date also, she was more than 16 years of age as on 23rd December, 2003. She remained with the accused no.1 for a couple of hours on motorbike. No shouts were raised or no resistance was ever shown by the prosecutrix.

(ii) Looking to the deposition of the prosecutrix, PW 5 at exh. 21, she has not supported the prosecution case. She has turned hostile. She was cross-examined by the learned Additional Public

Prosecutor. There is nothing against he present appellants. Looking to her deposition, after the whole cross-examination was over, it appears from the facts of the case that the prosecutrix was called in the chamber of the Trial Judge and she has stated certain facts in the chamber of the learned trial Judge. Even if these statements are taken as her evidence, then also, looking to her deposition, there is nothing against the appellants. Maximum it can be said that the prosecutrix has stated in the chamber of the learned trial Judge that the appellant no. 2, that is, Shailesh has committed rape on her. Now, even if this sentence is taken as her deposition, then also, it runs counter to her own version in the complaint. It was not the case in the complaint that Shailesh had committed rape on her. Only Ramesh-original accused no.1 had committed rape on her. This is a material improvement. Even it is not the prosecution case that Shailesh i.e. Original accused No.2 and appellant No.2 has committed any rape. Therefore, the sentence uttered in the chamber about Shailesh is nothing but a material improvement in her version. As per depositions of prosecution witnesses,

it is alleged that offence of rape was committed at the house of Shailesh (appellant No.2 or original accused No.2) but from facts, it is on record that wife of Shailesh as well as his children were at home. Story of abetment by Shailesh, in presence of wife and children is not convincing to prove the offence beyond reasonable doubt especially when prosecutrix has given deposition as hostile witness. Even, she had applied for bail for accused No.1. There are suggestions as to love affair, between original accused No.1 and prosecutrix. So far as appellant no.1 Hitesh is concerned, it is stated in the chamber that he was on another scooter, whereas the prosecutrix was on the motorbike of original accused no.1. Even this statement is taken as it is, it cannot be said that there is a abatement by the present appellant no.1 (original accused no.3). There is no other witness with the prosecution except the prosecutrix so far as the offence of rape is concerned.

(iii) Looking to the deposition of doctor who is examined as prosecution witness, namely Dr.

Rajendrakumar Bhagirathprasad Joshi, PW-2, it is stated in his deposition that the prosecutrix had given the history that the accused no.1 (who is not the appellant in this appeal before this Court) had committed rape on her. There is nothing against the present appellants so far as the case history is concerned. It is stated by Dr.Chandrakant B Patel PW-3, Exh.12 that on the basis of the x-ray report, the prosecutrix was more than 16 years of age. The certificate was also issued by the said witness at Exh.13. Thus, as per the deposition of the prosecutrix and as per Exh.25, the date of birth of the prosecutrix is 2.1.1987. Thus, on the date of the offence, that is, on 23rd December,2002, the prosecutrix was more than 16 years of age. Looking to the deposition of the prosecutrix, she remained on the motorbike of accused no.1 for a couple of hours. There are also several suggestions as to love affairs between prosecutrix and accused no.1. Apart from this aspect of the matter, the present appellants are not the original accused no.1. Even if the case of the prosecutrix is taken on its highest pitch, then also, only accused no.1 is involved in

the offence. There is nothing so far as the present appellants are concerned. The prosecution has failed to prove beyond reasonable doubt the offence against the present appellants. Even if what she has stated in the chamber of the Trial Judge after the whole deposition and cross-examination are over, is believed to be true, then also, there is nothing against the present appellants which involves them in the offence of abatement and attempt of offences punishable under sections 363, 366 and 376 of the Indian Penal Code. Even otherwise also, they have undergone sentence of about five months.

5. As a cumulative effect of all the aforesaid facts and reasons and the evidence on record, the judgment and order dated 6th July, 2006 in Sessions case no. 33 of 2005 passed by the learned Additional City Sessions Judge, Court No.13, Ahmedabad city, so far as the present appellants are concerned, is hereby quashed and set aside. They are acquitted of the offences charged against them. They are ordered to be released from the judicial custody, if not required in any other case. The appeal is allowed.

6. As this Court wanted to take up the Criminal Appeal for its final hearing, initially, bail was not granted to the appellants and now final judgment has already been passed in Criminal Appeal no.1280 of 2006 acquitting the present appellants and hence no order is required to be passed in Criminal Miscellaneous Application no. 8098 of 2006. Hence, this application is also disposed of.

(D.N.Patel,J)

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